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*In the Superior Court of Cincinnati.*

ANDREW M'MICKEN, TRUSTEE, ETC., vs. THE BOARD OF DIRECTORS  
OF THE M'MICKEN UNIVERSITY.<sup>1</sup>

The term "household furniture," though not susceptible of strict definition, has acquired a definite meaning, by which it is understood to include everything which may contribute to the use or convenience of the householder, or the ornament of the house, such as plate, linen, china, pictures, &c.

Where a testator by his will bequeathed to A. "all his library and household furniture of every description, and any other personal property not thereafter specifically devised," and by a subsequent clause devised to B. "all his real estate and personal property, which he may acquire after the date of his will," and again to B. "all the rest and residue of his real and personal estate, not thereinbefore devised," *Held*, that a portrait of testator, painted after the making of the will, and at the time of his death still in possession of the artist in another city, passed to A. under the devise of "household furniture."

By the law of Ohio "family pictures" are exempt from execution, but, per STORER, J., this exemption would not extend to the private gallery of a connoisseur nor to costly pictures the subjects of which are not connected with the family in whose possession they are found.

*W. B. Caldwell and M. H. Tilden*, for plaintiff.

*T. C. Ware*, for defendant.

The opinion of the Court was delivered by

STORER, J.—This action is brought to test the ownership of a portrait of Charles McMicken, deceased, the uncle of the plaintiff, and the founder of the McMicken University.

The plaintiff claims the property as legatee of Charles McMicken, whose will was made in September, 1855. The testator died in 1857, and his will was admitted to probate in April in the same year.

Mr. McMicken was a resident of Cincinnati, but his will was executed in Philadelphia; between the making of which and his death, he had sat for his portrait to an artist of the latter city, who had finished it, though it was still in his possession at McMicken's death. It was sent afterwards to Cincinnati, and all the parties

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<sup>1</sup> We are indebted for this case to the courtesy of M. H. Tilden, Esq.

concerned have submitted the case to us, to determine the ownership of the property.

The testator's family mansion, where he had long resided with one or both of the claimants, was in Cincinnati, and there was all his furniture and household ornaments, with the exception of his portrait.

By the 8th clause of the 4th section of his will, he gave to the plaintiff "all his library and household furniture of every description, and any other personal property not thereafter specifically devised, to be equally divided with his niece, Lizzie McMicken."

Other bequests are made to the same parties, as well as to other relatives and friends; but the great mass of his estate is given to the city of Cincinnati, "for the purpose of building, establishing, and maintaining two colleges for white boys and girls." This devise is in section 31, and the different classes of property given are particularly stated. For this purpose, by the 5th clause, "all his real estate and personal property which he may acquire after the date of his will," and, by the 9th clause, "all the rest and residue of his real and personal estate, not thereinbefore devised," is given to the city. These several clauses are those under which the parties severally claim.

The plaintiff regards the bequest of "the household furniture of every description" as broad enough to include the testator's portrait. The defendants, who represent the city, place their right upon the 5th and 9th clauses of the 31st section, already referred to.

The words "household furniture," or, as some of the older writers use the term, "household stuff," have now, we suppose, a definite meaning, and are understood by the profession to include a class of personal chattels very readily distinguished from the more general description, by which movable property may pass to a devisee or a vendee.

One of the earliest cases in the books where the question is discussed is that of *Kelly vs. Powlet*, Ambler 605. The point there made to the Master of the Rolls, Sir THOMAS CLARK, was this: did plate pass to the legatee of the "household furniture?" In

considering the question, he says, "the word household furniture has as general a meaning as possible. It is incapable of a definition. It comprises everything that contributes to the use or convenience of the householder or the ornament of the house." The term was held to be large enough to include plate, whether in use or not, provided it was in the possession of the devisor, and not intended for any other purpose than that of household use; the quantity and value to be measured by the condition and rank of the family. It was admitted by the plaintiff in this case, who is reported to have been present in Court, that "pictures, whether hung up or in cases, would pass by the devise," as well as plate. This case is also reported in Dickens 359.

Before this decision, it was held, in *Bridgman vs. Darr*, 3 Atk. 202, that a library of books did not pass by the words household furniture, giving, as a reason, that "they were for the entertainment of the mind, and not furniture for use or ornament." The rule has also been, in some one of its phases, discussed in *Franklin vs. Earl of Burlington*, Prec. in Ch. 251, *Nichols vs. Osborne*, 2 Peere Williams 400, *Le Farrant vs. Spencer*, 1 Vesey Sr., 97, and *Gayre vs. Gayre*, 2 Vernon 538. In *Pratt vs. Jackson*, 2 Peere Williams 302, the construction given by the Lord Chancellor was deemed too liberal, and on appeal to the House of Lords his decision was reversed: 3 Bro. Pa. Cas. 194.

The doctrine to be deduced from all these cases is summed up by Mr. Roper thus: "By the term household furniture, everything is included which may contribute to the use or convenience of the householder or the ornament of the house, as plate, linen, china, both useful and ornamental, and *pictures*:" Law of Legacies 141.

The English Courts have been consistent in their construction of the words we have alluded to. We discover no exception to the principle in any of the cases, from the report in Ambler to the present time. On the contrary, we find the law stated without any reservation in *Cole vs. Fitzgerald*, 1 Sim. & Stu. 189, which was affirmed in 3 Russell 320. The question was again discussed in *Cremorin vs. Antrobus*, 5 Russell 320, where Lord LYNTHURST expressly held these words would pass to the devisee "ornamental pictures."

Mr. Williams, in his elaborate work on Executors, Vol. 2, 1021, accepts the construction without any dissent on his part; and Jarman, in Vol. 1, 699, admits the doctrine in his text without reservation, though in a note he quotes from the report in Ambler, that "pictures hung up will pass;" while in the case to which he refers, reported both in Ambler and Dickens, it is expressly stated that the admission included "pictures not only hanging up, but those found in cases."

The meaning thus given to these devisory words is quoted with approbation by Chancellor KENT, in *Bann et al. vs. Winthrop*, 1 Johns. Ch. Cas. 329, and by the Court of Appeals in Virginia, in *Carnagy vs. Woodcock*, 2 Munford 234.

In Ohio, we have no judicial construction of these words in any reported case, but our Legislature, by several important statutory provisions, has informed us what its understanding has been of this class of personal property. By the section 43 "of the Act to provide for the settlement of the estates of decedents," 1 Swan 574, the personal representative is, in all cases, expressly required to leave with the widow, to be kept by her for life, and after her decease to be the absolute property of her children, all "family pictures." And by the 3d clause of the 1st section of an amendment to the law regulating judgments and executions, "family pictures are exempted from levy and sale."

We ought not to extend the exemption in these clauses to the private gallery of a connoisseur, nor yet to costly pictures, the subjects of which are not connected with the family in whose possession they are found. As the family Bible is specially excepted which preserves the names, the births, the marriages, and the burial of the parents and the children, so the portrait of a father or a mother may well be preserved as a living memory to a son or a daughter, alike consecrated by human sympathy, and vindicated by the law.

By the terms of the bequest in the 8th clause of the 4th section of the testator's will, the property described, which is defined to be household furniture of every description, must necessarily embrace all similar chattels owned by the deviser at the time of his

death, unless there is a subsequent clause restricting the bequest, or changing its natural meaning.

Such was the ruling of Lord CAMDEN, in *The Dean and Chapter of Christ Church vs. Barrow*, Ambler 641. "I am clear," said he, "that the pictures added to the testator's collection, after making his will, passed by the devise to the plaintiffs, upon the principle that personal estate is ever fluctuating; and so would it be in case of a devise of all a man's personal estate generally." See also *Masters vs. Masters*, 1 Peere Williams 424.

So in *Swinburne on Wills* 418: "It seems clear," says the author, "by our law and the civil law, that a devise of all a man's personal estate passes all he may die possessed of, and not only that he had at the time he made his will: if the contrary resolution should prevail, it would put one under the difficulty of making a new will every day, and create the greatest perplexity imaginable." See also *Gayre vs. Gayre*, 2 Vernon 538; *Wilde vs. Holzmeyer*, 5 Vesey Jr. 811.

The spirit of the 55th section of our Wills Act, 2 Swan. & C. 1627, although applicable to real estate strictly, would apply, if there could be room for doubt. In England, the Act of 1 Vict. c. 26, which changes the ancient rule as to after-acquired estates, expressly includes real and personal property by name.

If the devisory words we have thus examined will embrace the description of chattel in litigation, does the 5th clause of the 31st section of the testator's will limit the former bequest, explain it, or in any way modify his then expressed intention? The words relied on by the defendants' counsel are these: "all my real estate and personal property which I may acquire after the date of this my will," following the introductory language of the section, "I give, devise, and bequeath to the city of Cincinnati."

This clause, although broad enough to convey the whole after-acquired personalty, must be taken in connection with the previous devise to the plaintiff and his sister Lizzie, and be construed with all the circumstances attending the execution of the will, the nature of the chattel bequeathed, as well as the general purpose the

testator designed to accomplish, before we can clearly ascertain his intention.

The words household furniture are not used in any part of the will, except in the clause which gives all such property to the plaintiff and his sister. There is no restriction upon the terms, nor yet any exception as to chattels of the same description suggested by the testator. He commences the distribution of his estate by expressions having a known legal definition, and which unquestionably were understood by the counsel who drew the will, as well as by the deviser himself: he makes an absolute gift to his nephew and niece of all the chattels included in the class he described, without restriction or limitation, and it may well be inferred he could not have intended that the words personal property, subsequently used, should include any article of the class he had already excepted, more especially when we find he annexes to the term household furniture the words "and any other personal property not hereinafter specifically devised," thereby distinguishing his household furniture from every other denomination of his personalty. This is the settled rule of construction, where a prior clause in a will is attempted to be controlled by a subsequent one, whether in the same instrument or a codicil.

The principle is, "that technical words or words of known legal import shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise:" 2 Williams on Executors 927.

The leading case of *Jesson et al. vs. Wright*, decided by the House of Lords, and reported in 2 Bligh 56, 57, in which all the authorities were examined, establishes fully the doctrine. See also the opinion of Baron ALDERSON, in *Lees vs. Mossley*, 1 Y. & Coll. Exch. Eq. Cases 589, and DENMAN, C. J., in *Gallini vs. Gallini*, 5 B. & Adolph. 621. This doctrine is stated very clearly in *Young and Wife vs. Executors of McIntyre*, 3 Ohio 501. "The widow," says the Court, "claims upon general terms, and seeks an interpretation contrary to the evident intention. The daughter claims upon a bequest in express terms of the specific subject, and her claim comports with the whole intention."

See also 4 Ohio St. 351, *Thompson's Administrator vs. Thompson et al.* Nor is there any objection to this construction, in the fact that the portrait had not yet become a part of the household goods, and was moreover in a distant city when he died. It is a matter of intention merely, to what purpose the testator designed to apply it, and there is nothing to destroy the very natural implication, that it was his purpose to place it in his family mansion, any more than there would be if he had purchased in the same city, a service of china, or of plate, or some valuable article of mahogany or rosewood.

It might well be asked, if the object of the testator was not to make the portrait a part of his household ornaments, for what other purpose did he sit to the artist? None is intimated, much less proved.

We regard the relation the testator bore to his kinsmen of great importance in ascertaining his purposes to the various devisees in his will. He was an aged man and had never been married. The plaintiff and his sister were inmates of their uncle's family; the niece living with him, and doubtless, presiding over his household. To both, he gives by the 9th clause of the same section, under which the plaintiff claims the property in controversy, the permission jointly "to occupy his dwelling-house for the period of five years free of rent," thereby clearly intimating, as we believe, not only that the family mansion, at his decease, but the family furniture already devised, should alike be enjoyed by the legatees.

There would seem to be a fitness in sustaining such bequest, as the possession of the one very naturally attaches to it, whatever made convenient, or ornamented the other. The object was to preserve both, that the family, having lost its head, might still be remembered in this token of his regard for the surviving members.

A painstaking, laborious man, who had gained by industry a large fortune; who had struggled in the battle of life and won pecuniary independence; having no children, was about to distribute his estate, before the law would make a division among his kinsmen. With great particularity he gives to a long list of relations and friends, some token, either in money, real estate, or personal pro-

perty, of his regard. Having thus performed what he deemed to be his duty to others, he proposes to educate the poor children of Cincinnati; where he had long lived and at last died.

To establish on a magnificent scale, an institute for the moral and intellectual improvement of generations yet to come, he had an ideal before him to which his mind seemed to cling with great tenacity, and he developed it in his will, with as much clearness of detail, as the outlines of such a vast plan could be understood or foreshadowed, before its parts were finally adjusted, and its workings practically understood.

With this double object in view, the remembrance of his relatives, and the establishment of a noble charity for his race, we cannot suppose he could intend the bequest to either object should be contradicted by general terms, or mere formal language.

His family furniture could not materially aid in the foundation of a great public institution, either by the sale of the property, or its introduction within its walls. It was fit only for the family mansion, and could alone be properly valued by those who could associate with it the name of their relative and friend, who in common with them participated in its daily use;—more especially so, when a family portrait becomes the evidence of former friendship, or future remembrance.

We cannot presume it could have been the intention of the deceased to bequeath the mere work of the artist to an institution to commemorate the name of its founder, when by an act of princely liberality he had already erected a monument, upon which he might well inscribe the language of the poet:

“Non omnis moriar,  
Multaque pars mei vitabit Libitinam”

It will be more in harmony with the testator's spirit, and illustrate more truly the modesty with which he endows a university, by the bequest to our city of nearly half a million of dollars, for our own people to provide the portrait, or the statue, to commemorate a public benefactor. He who left them a splendid inheritance has done enough to perpetuate his name. When the edifice shall be erected,

where the recipients of his bounty are to be educated, it will then be a just tribute to his memory, that the canvas or the marble shall remind posterity of Charles McMicken.

On the whole case, we are of opinion that the plaintiffs, as devisees under the will of the testator, are entitled to the possession, and have the only title to the property they claim.

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#### LEGAL MISCELLANY.

The Supreme Court of New York, sitting at Rochester, have recently made a very important decision (in the case of *Hague vs. Powers*), sustaining the constitutionality of the Act of Congress of February 25th, 1862, under which the United States legal tender notes are issued; or, in other words, affirming the power of Congress to authorize the issue of such notes, and to enact that they shall be a legal tender for the payment of debts. The case appears to have been elaborately discussed by counsel and Court. Judges E. D. SMITH, JOHNSON, and J. C. SMITH delivered opinions, the length of which unfortunately prevents us from giving them to our readers in full, and WELLES, J., concurred.

The following statement of conclusions we take from the able and learned opinion of E. DARWIN SMITH, P. J.

1st. The issue of treasury notes is warranted by the Constitution of the United States at all times, in the discretion of Congress, as a medium for the payment of taxes under the taxing power, and as a form of security to the public creditors for money loaned under the power "to borrow money."

2d. The form, size, and denomination of such notes, and the making of them in the similitude of bank bills, and payable to bearer, so as to be transferrable by delivery, and go into circulation as money—are matters entirely within the discretion of the Legislature; and so far as relates to their voluntary receipt and circulation by the public, they stand upon precisely the same footing as bills of exchange or promissory notes issued by private individuals or corporations, and rest exclusively upon their credit as merchantable securities.